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No. 609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

EMMA R. MOIST, etc., et al.,
Petitioners,

v.

BERNARD BELK, etc., et al.,
Respondents.

REPLY BRIEF OF PETITIONERS

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Interstate Brief & Record Co., 356 E. Congress St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 609

EMMA R. MOIST, individually and as assignee of Sidney M. Harvey and William T. McAlonan; LOUISE C. KUSHIGIAN, Administratrix of the Estate of Thermie K. Henkle, deceased; GEORGIANA S. WHITMAN, survivor of herself and Henry R. Whitman, deceased, and EVELYN M. SANDERS, Special Administratrix of the Estate of Muriel Miller, deceased,

Petitioners,

versus

BERNARD BELK, individually and as alleged "Receiver" of Brookdale Cemetery Association and Brookdale, Inc., alleged Michigan corporations, GEORGE LEWIS, individually and as survivor of himself and Daniel Lewis and Saul Lewis, both deceased, formerly co-partners doing business as Lewis Brothers and as Lewis Bros., Inc., Lewis Brothers Memorial Chapel, Daniel Lewis & Brothers, Lewis Bros. Funeral Directors, Inc., and Mt. Sinai Memorial Cemetery Association, CHARLOTTE L. KLINE, Administratrix of the Estate of Saul Lewis, deceased, NAOMI V. HILSEN and RICHARD E. MANNING, successor administrators, duly appointed of the Estate of Daniel Lewis, deceased, BROOKDALE CEMETERY ASSOCIATION, an alleged Michigan Rural Cemetery Association, BROOKDALE, INCORPORATED, an alleged Michigan Profit corporation, CONSTANTINE A. TSANGADAS, JOHN R. STARRS, STANLEY E. BEATTIE, RALPH W. McKENNEY, SYDNEY LIST, DAPHNE LIST, JAMES M. WIENNER, Administrator of the Estate of Harris W. Wienner, deceased, and DEPARTMENT OF COMMERCE, formerly Corporation and Securities Commission, of the State of Michigan,

Respondents.

REPLY BRIEF OF PETITIONERS

As to Respondents' Replies Petitioners say:

1. Respondents Starrs, Beattie, McKenney, Tsangadas, Belk and Lewises do not deny that, acting in concert, they *purposefully* engaged in a *continuing* (¶3 p. 7 Petition) forbidden conspiracy set forth in Section 1985, 42 United States Code to bring about the appointment of one of their number as receiver of Brookdale Cemetery Association, a non-profit, rural cemetery corporation, by filing fraudulent claims against such corporation, and thereafter proceeding to use, contrary to Section 1983, 42 United States Code, the power possessed by defendant Starrs, as an officer of the State, to wrongfully change the title and ownership of certain land, and procure the allowance of said claims.

2. Respondents do not deny that Defendant Starrs, as receiver of Brookdale Cemetery Association, acting in concert with the other defendants, and wrongfully using the power possessed by him as an officer of the State:

> (a) Established an entirely new cemetery business for defunct Brookdale Cemetery Association upon its mortgaged land and thereafter wrongfully burdened such land with upwards of 6,000 graves (R. 87a), contrary to Michigan law, which expressly forbids continuing the business for which a corporation was organized more than 3 years after its Charter shall have become void (CL 1938, Sec. 450.-75 (Stat Ann Sec. 21.75)), and which expressly forbids the sale of burial rights upon mortgaged land (CL 1948, Sec. 456.109 (Stat Ann Sec. 21.879)).

(b) Dissipated upwards of $417,000.00 realized from said unlawful burials, substantially in fees, expenses and commissions paid himself and other defendants without making any provision whatever to establish a perpetual care fund expressly required by Michigan law (CL 1948, Secs. 456.107, 456.107A (Stat Ann Secs. 21.877, 21.877(1)).

(c) Made a sale of said dedicated cemetery land to pay a judgment creditor (R. Plt. Exh. 62, 197a-198a), contrary to Michigan law (CL 1948, Sec. 600.6023 (Stat Ann Sec. 27A. 6023)).

3. Respondents' "Briefs", "Objections" and "Answers", full of generalizations and wholly lacking in reference, detail, or support, disclose no relationship between Respondents' Replies and the Petition for Writ of Certiorari under consideration. The real issue here cannot be side-tracked by an unwarranted plea of *res adjudicata*. The Supreme Court of Michigan in *Harvey v. Lewis*, 357 Mich. 305 at p. 314, on the case as presented to it, modified the decree of sale, and specifically adjudged the title and ownership of the land in question to be in Brookdale Cemetery Association, incorporated as a Michigan non-profit, rural cemetery corporation pursuant to the express provisions of Brookdale Syndicate Number One, composed solely of plaintiffs (R. 12a-14a; 16a-18a, Plt. Exh. 5, 108a-109a). The present case is upon a different and subsequent cause of action, and only 5 of the present 14 defendants were defendants in the prior State court proceedings (R. 1a, Plt. Exh. 32, 153a).

It is the question litigated and determined in the original action, not what might have been thus litigated. Only upon such matters is the judgment conclusive in another action. *United States Fidelity & Guaranty Co. v. McCarthy*, 33 F2d 7, 9.

The facts as clearly stated *which Respondents do not deny,* clearly entitle plaintiffs be given an opportunity to prove their allegations and to obtain relief.

Nor can the real issues here be side-tracked by Respondents' allusion to the numerous unsuccessful attempts by former counsel to appeal successive interlocutory orders, all of which appeals were summarily dismissed without *any hearing whatever,* because former counsel failed to first obtain leave to appeal. See: *Harvey v. Lewis,* 365 Mich. 159, 160-161.

4. Respondents contend the actions taken by Defendant Starrs as receiver, all contrary to Michigan law, were taken pursuant to the order of the State court. Fundamental Constitution and Statutory Rights are protected against all forms of State action, *even judicial.* See: *Brouwer v. Kent County Clerk* (1965), 377 Mich. 616, 643, 644. In *Fish v. Fish* (1966), 4 Mich. App. 104, 108, the Court said:

> "It is not for the judge presiding over the court to determine whether or not he will apply the law. He has no choice. He did not make the law, and he cannot change it. That law is as obligatory on him as it is on the humblest suitor who ever appeared in his court. He is bound to apply it in determining controversies."

The Respondents have made no answer to the cases which Petitioners have pointed out showing the conflict on the law between the various Courts of Appeal in regard to the questions raised in this case. Furthermore, they fail to show that the Court of Appeals did not misapply the law as laid down by this Court. Petitioners ask this Court to resolve these questions.

CONCLUSION

Wherefore, the Petitioners again respectfully petition this Honorable Court to issue a writ of certiorari directed to the Court of Appeals for the Sixth Circuit commanding said Court to send to this Court a full and complete transcript of the record in said Court, to the end that this cause may be reviewed by this Court, and that the erroneous judgment of the Court of Appeals for the Sixth Circuit be reversed and such other relief be granted as to this Court may seem proper.

Dated this 11th day of October, A. D., 1967.

Respectfully submitted,

AUGUST F. BRANDT,
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